Goodbye to the EJRA

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On 25th September 2014 a notice appeared in the *Gazette*, tucked away on page 7, informing readers that the University's Appeal Court has "recently raised some issues regarding the EJRA policy and procedure".* It went on to inform readers that the "University will consider the *comments* of the Appeal Court and *may* bring forward the date of the five-year interim review". In the meantime, "the current policy remains in effect until such time as it may be changed".

Readers will be curious to know the nature of those "comments". First the background. In 2010, Parliament passed the Equality Act 2010 which, following the law of the European Union, adds age to the categories protected against discrimination. To discriminate on the ground of age is unlawful. Compulsory retirement on the ground of age constitutes discrimination and is therefore illegal. However, the Act allows an institution to claim exemption and reintroduce a compulsory retirement age for "legitimate aims". In 2011, the University administration reintroduced compulsory retirement at 67 for academic staff, claiming legitimate aims in doing so. The scheme was neither debated nor voted on in Congregation. The scheme is known as the EJRA.

In order to soften the effect of mandatory retirement, the administration added a procedure for extension beyond 67, if certain conditions were satisfied. Colleges with one or two exceptions followed suit and adopted their own EJRA's. The legitimate aims claimed were: certainty in planning; diversity; inter-generational fairness; refreshing the workforce; the joint appointment system; and the desire to avoid performance management. In order to justify the EJRA the administration must show that it is a proportionate means for achieving the legitimate aims. That requires balancing the aims against the effects of discriminating against older staff.

Under the Statutes of the University, the Appeal Court hears appeals from a range of internal procedures, including refusal to allow a member of the academic staff to continue working beyond 67. Its decisions are binding on the University. The judges of the Court are very senior judges, usually no longer sitting full-time, of the High Court and Court of Appeal. In this case the judge was Dame Janet Smith, formerly of the High Court and then Court of Appeal, in which courts she served with distinction for 25 years and she is one of the most senior and respected judges in the land, an indication of which is her presiding over the Jimmy Saville enquiry.

As the one who brought the appeal, I argued that the EJRA scheme is not "objectively justifiable" as required by law and therefore dismissal for age constitutes unlawful discrimination. After lengthy written submissions and oral hearing; the Court, on 1st September 2014, issued a reasoned written judgment upholding my appeal on the following grounds:

(i) The EJRA as a scheme, including the age of 67, is not objectively justifiable as required by law.

(ii) The procedure for extension is so unfair that denial of extension is "an inevitably unfair dismissal".

* * *

After extensive written and oral argument, during which the administration was represented by a barrister and solicitors, the judge thoroughly examined each of the legitimate aims and concluded as follows:

*Inter-generational fairness and refreshing the workforce***

The Court concluded that:

> *"It does not seem right to me to rely on the aim of inter-generational fairness when seeking to impose a compulsory retirement age on a group of statutory professors even though it may be a valid consideration for some other grades.* [61]" [A point the judge left open].

The Court decided that it is not necessary to have an EJRA as low as 67 "in order to achieve [and] to maintain a reasonable level of turnover of senior staff or to avoid difficulties in the transitional period." Experience of the EJRA to date "suggests that there would be no great problem in having a compulsory retirement age of, say, 70."[62]2

Planning

The judge accepted the organizational need for predictability as potentially a legitimate aim. But, she continued, that aim:

> *"cannot of itself justify any particular EJRA. However, I do not think it could ever amount to weighty justification because there are other steps which could be taken to reduce the difficulties caused by any uncertainty in the date of retirement."* [65]

Diversity

The Court acknowledged that the promotion of gender equality is a legitimate aim for the University. It concluded, however, that:

> *"the actual benefits of an EJRA in promoting gender equality are very slight when one considers that they are achieved at the expense of causing a different form of discrimination."* [66]

Avoidance of performance management/collegial system

Since the performance management of older academic staff would be discriminatory, the alternative would be to have performance management for all staff. The need to avoid this was advanced by the administration as a legitimate aim. It was also claimed that the collegial system made Oxford special in such way as to justify mandatory retirement. On these points the Court concluded that:

"neither the avoidance of performance management nor the existence of the collegial system cannot (sic), for Oxford, amount to a legitimate aim or objective which an EJRA will help to promote." [67]

Age 67

According to the law developed in the European Court of Justice and the English courts, in addition to showing that the scheme as a whole is objectively justified, the institution must show that the age selected for mandatory retirement is itself objectively justified.

After considering the arguments for 67, the Court drew attention to the "spirit and purposes of the legislation" which are that people are living longer, enjoy better health, "and should be permitted and encouraged to work longer" [56]. The age of 67 does no more than take the University back to what was the situation in the 1960s. The Court concluded that 67 is not in the spirit of the Equality Act and is not objectively justifiable.

Conclusion

In light of these findings, the judge concluded:

"I do not think that the policy of imposing retirement at 67 can be objectively justified. The aims and objectives which could justify any compulsory retiring age ("refreshment" and succession planning), have not been shown to be weighty. The University was so determined to hold on as closely as possible to the previous situation that it failed to consider the issues openly and objectively. I have not been shown either evidence or argument why it was reasonably necessary to select an age as low as 67 as opposed to some later age, which would clearly be less severe in its discriminatory effect. The legitimate aims and objectives to which I have just referred do not appear to me to be of such weight and importance as could properly outweigh the legitimate expectations of academic staff to work longer and to have an element of choice as to their retiring age." [68]

Procedure for extension

The Court asked whether the existence of an extension procedure could assist in justifying a policy, which would not otherwise be justifiable. The administration's case was that the effect of the mandatory retirement at 67 is mitigated by what are described as: "the fair, transparent and inclusive processes of extension". [69] The question was whether the procedure for allowing some employees to stay on after 67 means that the discriminatory effect of the policy is much reduced and so helps to justify the EJRA as a proportionate means of achieving its aims.

The judge rejected this argument in no uncertain terms. She concluded that the existence of this extension procedure does not assist in the justification of a compulsory retirement age. The opposite: it undermines the whole purpose of having an EJRA. She continued:

"The University is in effect saying to its employees, when you reach the age of 67, you will enter a process for deciding whether you will be allowed to stay on. If that process results in rejection, the University cannot say that the principle reason for dismissal is that the employee has reached an objectively justifiable retirement age; it is because his application to stay on has been rejected. It follows that the University cannot rely on the EJRA to show that the dismissal is automatically fair." [72]

The scheme depends for its validity on a balance being struck between the wishes of the person wanting to continue and the needs of the University. The Court found that in the document stating the procedure for extension, there is no "attempt to balance the wishes of the individual with the needs of the University". [82] The wishes of the staff member:

"have little place in the procedure. He or she has a right to be heard. Also, he or she may advance personal circumstances which may justify exceptional treatment. Other than that, the criteria are all related to the interests of the University." [82]

According to the judge, the procedure has several defects, the most severe and fatal being that the extension procedure is:

"Designed not to mitigate the discriminatory effect of the EJRA but rather to enable the University to pick out those members of staff which it wishes to retain while requiring any others to retire." [88]

The conclusions are striking:

"The evidence that I have heard has confirmed the clear impression I had gained from the documents that this procedure was not in reality designed to complement or improve the EJRA policy. Rather it was designed to allow the University to have the ha'penny of making some people retire at 67 (without having to be paid compensation for unfair dismissal) and the bun of allowing the University to retain those employees which it wished to keep. I accept that the University has some good reasons for wanting a compulsory retirement age and in some respects wanted an EJRA. But its overriding wish was for a means of choosing who stays on and who goes. As I have said earlier, I am quite satisfied that the University acted in what it believed were its best interests but it has created a process which not only has internal flaws but is fundamentally unacceptable as a means of deciding whether someone should be dismissed. ***In my judgment rejection of an application under this procedure could never amount to a potentially fair reason for dismissal."*** [100][emphasis added]

The judge concluded that requiring an established employee "to demonstrate that he is indispensable or be dismissed is an inevitably unfair dismissal". [101]

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Effect of the judgment

The Appeal Court prepared two judgments, one dealing with the general issues as set-out above, the other as an appendix dealing with the facts of my own case. My argument was that in order to decide my appeal, the Appeal Court had to decide whether the EJRA scheme is legally justifiable. At a preliminary hearing, the administration opposed my argument. The Court adjourned and, on 8th April 2014, Dame Janet handed down a written judgment in which, after thorough consideration of the matter, she concluded that the Court had jurisdiction to consider the validity of the EJRA scheme.

The point of writing two final judgments, one on the general issues and one on my case, is then plain: the findings in the first judgment concern the validity of the EJRA and therefore are of general interest and importance to the University and all members of academic staff.

The judge left us in no doubt in stating:

> *"I have decided this appeal on issues of principle unrelated to the particular facts of the appellant's case."* [101]

The important issue, however, is that the University's own Appeal Court, within the confines of the University rather than in a public forum, has ruled decisively and definitively on the legality of the EJRA. It is now time for Congregation, the Sovereign Parliament of the University, to take an active role in considering how best to proceed. There is no better place to start than to insist that the administration accept the ruling, suspend immediately the EJRA, and jointly with Congregation plan for the future.

* The University's published responses to the appeal can be found at; *http://www.ox.ac.uk/staff/staff_communications/update_on_major_issues#* and *http://www.ox.ac.uk/gazette/2014-2015/25september2014-no5070/notices/#169699*

**All the quotations in this article are taken from the judgment of Dame Janet Smith entitled: *In the Oxford University Court of Appeal: In the Appeal of Professor Denis Galligan* (1st September 2014). The number following each quotation refers to the paragraph in the judgment.

Consideration of comments on the EJRA made by the University's Appeal Court

STEPHEN GOSS

The University has operated an Employer-Justified Retirement Age (EJRA) of 30 September before the 68th birthday for all academic and academic-related staff since October 2011. The policy includes a process under which individuals may apply to extend their employment beyond the EJRA, such applications being considered by the EJRA Panel. If the panel declines a request, the individual may appeal to the University's Appeal Court.

As reported in the *Gazette* of 25 September 2014, the University's Appeal Court has recently heard such an appeal and has raised some issues regarding the EJRA policy and procedure. The decision of the Court is binding only in relation to the appeal of the individual concerned, and does not create any binding precedent on the University as a whole. The other observations of the Court on the EJRA policy are for the University to use in its consideration of the future of the policy.

The EJRA was established, with the agreement of Congregation, in 2011, following changes in national legislation. After two rounds of wide consultation across the collegiate University, the underpinning amendment to Regulation 7(1) of Council Regulations 3 of 2004 was published to Congregation in the *Gazette* in the normal way: no objections were received, no alternatives were proposed and no Debate was requested. Accordingly, the amendment was implemented.

It was agreed that the EJRA would operate for an initial period of ten years with an interim review after five years. In addition, annual reviews are undertaken by the Personnel Committee.

In the Gazette of 25 September 2014, the Personnel Committee reported that it would consider in Michaelmas term how to respond to the issues raised in the judgment. In the *Gazette* of 13 November 2014, it was reported that the Personnel Committee had met and held an initial discussion as to whether the five-year review should be brought forward from 2016/17. The committee, mindful of the importance of giving the issues raised in the judgment careful and thorough consideration, decided that it needed further information prior to another discussion at its meeting in seventh week of Michaelmas term.

The Personnel Committee met again in seventh week and discussed this matter further. It was concerned to ensure that any review of the over-arching EJRA policy has the benefit of sufficient data on which to base reasoned recommendations to Congregation should any changes be considered desirable. Personnel Committee was also aware that those matters raised by the Appeal Court that can be considered in the short term should receive attention as soon as possible. In this context, the committee decided that, in the course of 2015 and with detailed work carried out by a sub-group with some co-opted members, it will consider:

1. Whether the aims of the EJRA need to be clarified;
2. Whether changes are needed to the Considerations (the criteria) for extensions to employment; and,
3. Whether there should be other procedural changes relating to the process for considering requests for employment beyond the EJRA.

The Committee will also oversee the data collection required to inform a wider review of the EJRA and, in the longer term, it will bring proposals to Council to set up a working party to undertake that review. It is anticipated that the working party will consider the extent to which the EJRA is meeting the Aims identified when the policy was established, whether the EJRA is appropriately set at the 30 September before an individual's 68th birthday, and whether it applies to the right staff groups. These issues, and any others that seem relevant, will be considered in the context of case-law at that time and data concerning the impact of the EJRA at Oxford in comparison with other higher education institutions with and without a retirement age.

Council considered and endorsed this plan of action at its meeting in eighth week of Michaelmas term. Congregation will be kept updated on the committee's progress. The current policy remains in effect until such time as it may be changed.